159

(2)

No. 09-1066

APR 7 - 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1064 or 1065

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW
SUZANNE K. COLT,
of Counsel.
*Counsel of Record

April 8, 2010

QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly affirm the District Court's (1) denial of petitioners' claim for tuition reimbursement because petitioners failed to demonstrate that the IEP developed by DOE would have deprived T.Y. of a free and appropriate public education, and (2) granting of DOE's motion for summary judgment dismissing the case, where, *inter alia*, the Circuit Court concluded both that the failure to name a specific school for T.Y. within the IEP did not constitute a denial of a free and appropriate public education, and petitioners were included in the process of school selection ?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

Background 2

Litigation History 5

The District Court's Order 11

The Order of the Second Circuit Court of Appeals 15

REASON FOR DENYING THE PETITION 17

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

CONCLUSION 26

TABLE OF AUTHORITIES

A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Circuit, 2007), cert. denied, 2008 U.S. LEXIS 1181 (2008) ..... *passim*

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) 22

Florence County School Dist. Four v. Carter, 510 U.S. 7 (1999) 13

Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484 (2009) 21-22

K.Y. ex rel. T.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827 (E.D.N.Y. 2008) 1

Singleton v. Wulff, 428 U.S. 106 (1976) 22

Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008) 23

T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009) 2, 15

Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994) 23

United States v. Penev, 2010 U.S. App. LEXIS 1512 (2d Cir. 2010) 23

Walczak v Florida Union Free School District,
142 F.3d 119 (2d Cir. 1998).....13

STATUTES

Individuals with Disabilities Education Act ("IDEA"), 20
U.S.C.§1400(d)(1)(A).....7

No. 09-261

IN THE SUPREME COURT OF THE UNITED STATES

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Petitioners-appellants T.Y. and K.Y., on behalf of T.Y. ("petitioners"), appealed from a judgment of the U.S. District Court for the Eastern District of New York (Johnson, U.S.D.J.), entered July 2, 2008, see K.Y. ex rel. T.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827 (E.D.N.Y. 2008) (Pet. App. 15-30), which granted

the motion of defendant-appellee, the Department of Education of the City of New York ("DOE," or "respondent"), for summary judgment dismissing the complaint. The District Court held that petitioners were not entitled to reimbursement of the tuition paid to a private school for their autistic child, T.Y., because they failed to demonstrate that DOE's plan for T.Y.'s education would have deprived him of a free and appropriate public education, and the Court of Appeals for the Second Circuit affirmed. See T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009) (Pet. App. 1-14), holding that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA" (citations omitted).

Respondent requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's October 9, 2009 decision. The order below does not conflict in an important way with a decision of this Court or another court of appeals on any question petitioners attempt to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

Background

At the start of the 2006-2007 school year, T.Y. was a four-year-old boy who had been classified as having autism and presented with significant cognitive, language and developmental delays. During the 2005-2006 school year, T.Y. was in preschool class with eight students, two teachers, and one classroom paraprofessional at the Marcus Avenue Early Childhood Development

Program, where he received speech and language therapy, physical therapy and occupational therapy and the assistance of a full time one-on-one crisis management paraprofessional.

On May 10, 2006, the Committee on Special Education ("CSE") convened to formulate an individualized education program ("IEP") for T.Y., and to make recommendations for T.Y.'s 2006-2007 school year. T.Y.'s parents, petitioners in the present matter, participated in the meeting, as did a special education teacher, parent member, district representative, school psychologist, and an Applied Behavioral Analysis ("ABA") teacher. No general education teacher was present at the CSE meeting, because a general education program was not appropriate for T.Y., as his parents later conceded at the DOE hearing.

The IEP formulated on May 10, 2006, accounted for T.Y.'s then-current academic achievement and functional performance by assessing his language skills, impairments and deficiencies, his social and emotional skills, his physical development, and the state of his adaptive living skills. The IEP recommended that, given his severe cognitive and language delays, T.Y. not participate in a general education environment, except for supervised participation in activities such as lunch, assemblies, and trips. For these reasons, it was also recommended that T.Y. participate in alternate assessments and the IEP described how this would be accomplished.

The IEP set forth detailed annual goals and short-term objectives to measure progress towards those goals in a twelve page report. These goals

encompassed T.Y.'s primary needs, including language skills, oral motor skills, social and emotional skills, gross and fine motor skills, sensory processing, and adaptive living skills.

The CSE recognized that T.Y. exhibited some negative behaviors in response to frustration, such as hand biting, hair pulling, and aggression, and that he required reinforcement and prompting to engage in classroom activities. The IEP highlighted these behavioral needs by targeting negative behaviors in two of his goals.

The IEP recommended that T.Y. be placed in a special class in a specialized school within District 75 with a staffing ratio of 6:1:1 (six students, one teacher, one paraprofessional) for a twelve-month school year beginning in July, 2006. Additionally, a full-time, in-class, crisis management paraprofessional, and related services, including speech and language therapy three times weekly, occupational therapy twice weekly, and physical therapy twice weekly, were also recommended.

Following the issuance of the IEP, the DOE recommended P.S. 255 for T.Y., which petitioners visited and rejected. DOE next recommended P.S. 75Q, which petitioners also rejected, without visiting the school. Without seeking another public school recommendation, petitioners unilaterally enrolled T.Y. at the Rebecca School ("Rebecca"), a non-state-approved private school, for the 2006-2007 school year by first making a $10,000 deposit on July 10, 2006, and then entering into a contract with the school, signed July 25, 2006.

At Rebecca, T.Y. was placed in a class with a staffing ratio of 6:1:3, and received speech and language therapy and occupational therapy. The school also employed occupational therapists and physical therapists, and offered a sensory gym. T.Y. also required services outside of Rebecca that were recommended on his IEP, but that the school could not provide, including additional speech and language therapy, and ABA services.

Litigation History

By letter dated September 5, 2006, petitioners requested an Impartial Hearing for reimbursement for the cost of tuition at the Rebecca School as well as the additional out-of-school services T.Y. received. The letter included fourteen objections to DOE's May 2006 IEP.

The Impartial Hearing

An initial hearing was held on October 16, 2006, and the merits of the case were considered at an impartial hearing which was held on November 14, 2006, and which continued on November 28, 2006. Both parents were present and were represented by counsel. Appearing for DOE was Kenneth Stark, a school psychologist, Chairperson Designee. Various documents were introduced into evidence by the parents, including the IEP and other documents concerning T.Y.'s disabilities. Of particular interest were the reports that described T.Y.'s progress prior to the May 10, 2006 CSE, including the Educational Update of January 11, 2006, the Age-out Report of March 9, 2006 and the March 28, 2006 Progress Report. These reports detailed T.Y.'s disabilities, exemplified by

rudimentary ability to communicate, with both expressive and receptive language impairment, and oral motor deficits, including open mouth posture and poor control of oral secretions and significant drooling. His cognitive skills were described as "at the 18 month range," and his social-emotional development "at the 20 month level," and his communicative skills "at the 16 month age range." These levels were reflected in the IEP, and goals for improving his various skills were outlined in detail in the May, 2006 IEP.

Jana Diamond, an ABA therapist, testified on November 14, 2006, about the services being provided to T.Y. after school as well as his experience at the Rebecca School. Tanya Sanchez, a speech and language therapist, had been working with T.Y. for about one year, for three to five hours per week on his speech and communication.

K.Y., T.Y.'s father, testified on November 28, 2006, that he worked as a steamfitter for the City of New York, earning a base salary of $71,000 per. year, and an additional $10,000 to $20,000 per year in overtime work. He testified that he could not afford to pay the Rebecca School tuition for his son.

T.Y., T.Y.'s mother, testified as to (1) the IEP meetings; (2) the schools she had visited; (3) her difficulties in getting enough speech therapy for T.Y.; and (4) her belief that T.Y. needed the specific type of program offered by the Rebecca School with continual one-on-one attention for his behavior problems. Two more witnesses, Tina McCourt, a teacher from the Rebecca School, and Rosemary Randazzo, T.Y.'s private after-school ABA therapist, who provided six hours per week of 1:1

after-school ABA therapy, were called by petitioners to testify about T.Y.'s progress.

Kenneth A. Stark, a school psychologist for DOE, specifically addressed the objections expressed by the petitioners as follows. He testified that there was no need to have a general education teacher present at the IEP meeting because, as T.Y.'s mother conceded, T.Y. was not a candidate for general education. Mr. Stark also testified that the IEP did not mention parent training and counseling because, under the Commissioner's regulations, such training was "part and parcel of District 75 programs for children who are classified with autism". He also noted that an educational evaluator and a social worker were not present at the IEP because they were not required at this type of IEP. Mr. Stark also testified that a specific school is never suggested at an IEP meeting, but rather a program is recommended for the child, and a placement officer later helps parents choose a specific school that can fulfill the child's individual educational needs.

The Impartial Hearing Officer's Findings of Fact and Decision

The Impartial Hearing Officer ("IHO") issued a twenty-page decision on December 28, 2006 (Pet. App. 71-100). After reviewing the evidence in considerable detail, including a careful summary of petitioners' fourteen objections to the IEP, and a full account of the IEP itself, the IHO found that petitioners had not met their burden of demonstrating that the DOE's recommended program was inappropriate. The IHO first reviewed the Individuals with Disabilities

Education Act ("IDEA"), 20 U.S.C.§1400(d)(1)(A), which requires that all children with a disability be provided with a free, appropriate public education ("FAPE"). The IHO pointed out that (Pet. App. 81):

> A FAPE is offered to a student when (a) the Board of Education complied with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable a student to receive educational benefits. While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Procedural violations lead to a finding that FAPE has been denied only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.
>
> A school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress that is not trivial, but need not maximize the potential of a student with a disability (citations omitted).

The IHO then discussed each objection submitted by petitioners and concluded that at

least ten of them were without substance (Pet. App. A 83-93). However, the IHO did agree with petitioners that the IEP did not meet T.Y.'s needs in regard to speech and language services and that he needed an additional three hours of speech and language therapy per week after school (in addition to his three 30-minute sessions in school) (Pet. App. 88-89), but concluded that this flaw in the IEP did not amount to a failure to provide a free and appropriate public education (Pet. App. 94).

The IHO also found that petitioners did not meet their burden of demonstrating that the Rebecca School provided an appropriate program for T.Y. (Pet. App 95-97).

The IHO ordered the DOE to (1) fund an additional three of hours of speech and language therapy, in addition to the speech and language therapy the Student was already receiving outside of Rebecca; and (2) provide certain compensatory services, which were related to a previous school year and are not at issue in this case (Pet. App. 99).

Petitioners appealed the IHO's decision to the New York State Education Department's Office of State Review by petition, dated January 30, 2007 (A 304-320). The DOE answered, but did not challenge the IHO's order to fund the additional speech and language therapy (A 321-339).

The State Review Officer's Decision

In a single-spaced, sixteen-page decision, the State Review Officer ("SRO") upheld the IHO's decision and agreed that petitioners did not demonstrate that the DOE's recommended program

was inappropriate (Pet. App. 33-70). After an exhaustive, detailed review of the documentary evidence and testimony, as well as the applicable statutes and precedent, the SRO concluded (Pet. App. 59):

> Based on my review of the IEP, I concur with the impartial hearing officer that the IEP was adequate. While the child could not be placed in a regular education class or program, his IEP properly described his needs, accurately reported his present levels of performance, set out goals in all appropriate areas of need, included appropriate short-term instructional objectives for each goal as a part of his alternate assessment program, recommended an appropriate placement for kindergarten, recommended appropriate strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas.

The SRO reversed the IHO on one point, finding that the provision of parent counseling and training should have been stated explicitly on T.Y.'s IEP (Pet. App. 59). However, the SRO held that the absence of the explicit provision did not deprive T.Y. of a free and appropriate public education (Pet. App. 59).

Having found petitioners did not meet their burden of demonstrating the DOE's program was inappropriate, the SRO did not consider the issue of

whether the petitioners' unilateral placement of T.Y. at Rebecca was appropriate (Pet. App. 69).

The Summons and Complaint

Petitioners served the summons and complaint herein on August 15, 2007, seeking (1) to reverse the SRO's and IHO's decisions; (2) a declaration that DOE failed to offer T.Y. a free appropriate public education for 2006-2007; (3) a declaration that T.Y.'s 2006-2007 placement at the Rebecca School was appropriate and reimbursable; (4) an order directing DOE to reimburse petitioners for Rebecca School's tuition and to provide full supplementary services; (5) a declaration that petitioners were the "substantially prevailing" parties; and (6) attorneys' fees. DOE answered on September 7, 2007, denying the allegations (A 58-64).

Petitioners then filed a motion for modified de novo review, which reiterated the demands set forth in the complaint. On April 7, 2008, DOE cross-moved for summary judgment. DOE attached its Local Rule 56.1 statement of undisputed facts, as well as various documents, including the entire transcript of the Impartial Hearing, and a twenty-one page memorandum of law. DOE argued that DOE had offered a free appropriate public education for T.Y., and petitioners had failed to meet their burden of demonstrating that DOE's program was inappropriate.

The District Court's Order

The memorandum and order of the District Court (Johnson, U.S.D.J.), affirming the decision of the SRO and granting defendants' motion for summary judgment was entered on July 2, 2008 (Pet. App. 15-30). The Court reviewed the history of the case, beginning with the May 10, 2006 CSE meeting (Pet. App. 16-20). The Court noted that the Committee addressed itself to T.Y.'s "significant cognitive, language and developmental delays," as well has his need for attention to "his language skills, impairments and deficiencies, his social and emotional skills, his physical development, and the state of his adaptive living skills" (Pet. App. 17). The Court also noted that the CSE had considered his negative behaviors and the importance of addressing them (Pet. App. 17). The Court also reviewed the specifics of the IEP's recommendations (Pet. App. 17-18):

> (1) that T.Y. be placed in a special class in a specialized school with a staffing ratio of 6:1:1; (2) that the normal school year be extended through an entire calendar year for T.Y.'s benefit; (3) that a full-time, in-class, crisis management paraprofessional be assigned to work with T.Y. on an individual basis; and (4) that T.Y. receive a number of related, school-based services such as speech, language, occupational, and physical therapy, two to three times each week. In addition, T.Y.'s program would have included counseling and training for his

> parents, as is required with any placement for an autistic student (citations omitted).

As the Court noted, the IHO concluded that "[petitioners] failed to demonstrate that the overall program developed and recommended by the DOE deprived the student of a free and appropriate public education" (Pet. App. 19).

The Court then set forth the standard of review as to administrative decisions under the IDEA, as defined by Walczak v Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998), which held that where the Court does not have the specialized knowledge to resolve complex educational issues, it should defer to a thorough and careful decision of the state hearing officer (Pet. App. 21). After reviewing the requirements for an adequate IEP, the Court held, quoting Florence County School Dist. Four v. Carter, 510 U.S. 7, 12-13 (1999) (Pet. App. 22-23):

> A state board of education may be required to reimburse parents for the cost of an alternative educational program only if: 1) the educational program recommended by the board is deemed to be inappropriate under the law; 2) the program selected by the parent was appropriate in that it met the student's special education needs; and 3) the equities support the parent's claim.

The Court concluded that summary judgment was appropriate because (1) it deferred to

DOE's administrative hearing officers' extensive experience in the field of special education; (2) the IHO's and the SRO's decisions showed detailed and careful consideration of the issues herein, including over thirty documents in evidence, and the testimony of several witnesses during the three-day hearing (Pet. App. 24-25).

However, the Court concluded that its own review of all the evidence supported the same conclusion reached by the SRO (Pet. App. 25). The Court cited DOE's Rule 56.1 Statement, unchallenged by petitioners, which stated that "school officials made every effort, as required under the law, to fashion a plan that provided the child with the tools and support necessary to create an educational environment that would enable him to succeed" (Pet. App. 26-27). The Court noted that the SRO found that other plans were considered by the CSE for T.Y., but that after some discussion, they were replaced by an IEP better suited to T.Y.'s needs, thus defeating petitioners' argument that the IEP was a cookie-cutter, predetermined plan (Pet. App. 27). In addition, the Court cited the IEP's plan for a full-time paraprofessional to be with T.Y. throughout the school day, to minimize his negative behaviors, making a Functional Behavior Plan ("FBA") and a Behavior Intervention Plan ("BIP") unnecessary (Pet. App. 27-28). Also, the Court observed that the 6:1:1 ratio of students to teacher and teaching assistant was properly recommended in view of the CSE's knowledge of T.Y.'s prior progress (Pet. App. 28). And, although petitioners complained that they were not involved in the CSE's discussions, there was no dispute that they were present during the meeting and had an opportunity to express their opinions and concerns

(Pet. App. 28). Although the availability of "parent training and counseling should have been explicitly incorporated in the IEP," the failure to mention that such training was an integral part of DOE's education for all autistic children did not mean that the IEP failed to offer a free and appropriate education to T.Y. (Pet. App. 29).

The Court concluded that, petitioners having failed to establish that respondent's plan for T.Y. would have deprived him of a free and appropriate education, the SRO's decision to deny their request for reimbursement of their private school tuition was affirmed and DOE's motion for summary judgment was granted.

The Order of the Second Circuit Court of Appeals

The Second Circuit held that although the District Court's characterization of a Rule 56.1 statement as "necessary" was not entirely correct, it was an inconsequential error, as the District Court had conducted a thorough, independent review of the record. T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412 (2009) (Pet. App. 9).

In regard to substantive violations, the Court agreed with DOE that the Administrative Hearing Officers' opinions were "thorough and well-reasoned," and "deserve deference" (Pet. App. 10). "While the parents argue that a crisis paraprofessional was no substitute for a functional behavioral assessment or behavior intervention plan, there is substantial evidence in the record that the 1:1 aide provided significant benefits to the

child in addressing the problematic behaviors" (Pet. App. 10).

The Court found that the record indicated that the initial individualized education plan (IEP) "lacked the requisite speech and language services and parent training, but such errors were suitably corrected" by the hearing officers "and did not render the IEP as a whole substantively deficient" (Pet. App. 10). The Court saw "no reason to second guess the reasonable, professional determinations of the IHO and SRO in the case" (Pet. App. 10).

As to procedural violations, because there was no requirement in the IDEA that the IEP name a specific school location, the IEP was not procedurally deficient for that reason. The Circuit Court held that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA" (Pet. App. 13). The Court found that, in any event, T.Y.'s parents did participate in school selection, but they rejected the first two school options offered by DOE, one of them site unseen, and enrolled T.Y. in the Rebecca School without waiting for another recommendation by DOE. The Court held that IDEA grants the parents input as to school choice, but not a veto (Pet. App. 13-14).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument of petitioners herein, there is no important conflict among the Circuit Courts of Appeals in their interpretation of the IDEA regarding an alleged requirement to name a specific school in the IEP. No Circuit has adopted the argument of petitioners that (1) the IEP must always specify the precise school it recommends for the subject child, and (2) in order for the parents to meaningfully participate in the process, they must be able to reject all placement suggestions made by the school district.

A. This Case is Not Certworthy

Petitioners' primary argument is that "the Second Circuit's decision is in direct conflict with the prior decision of the Fourth Circuit Court of Appeals in *A.K.*, [A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 680-681 (4th Circuit, 2007), cert. denied, 2008 U.S. LEXIS 1181 (2008)], which held that the school district violated the IDEA by not specifying a school site on the student's IEP" (Pet. 17). This characterization of the holding in A.K. is exaggerated and misleading, and it fails to take into account the significant differences between the circumstances surrounding A.K. and T.Y. Even

petitioners describe this alleged split as merely "unhelpful" (Pet. 16).

A.K. was a fourteen-year-old with several disorders, includingAspergers Syndrome in Alexandria City, Virginia, who, after encountering significant social difficulties in his Alexandria public school, enrolled at Riverview, a residential school for special needs children in Massachusetts, for the seventh grade. The Alexandria school system paid the equivalent tuition for a local private day school, and A.K.'s parent's were pleased with his progress. For the eighth grade, his IEP did not name any particular school, instead listed his placement as "Level II—Private Day School placement." Two schools for children with special needs had been discussed with his parents but were not named in the IEP. Because of their familiarity with those two schools, which they had themselves investigated and visited, and having consulted experts who knew A.K. and who were also familiar with the two schools, the parents decided not to formally apply to the schools and have A.K. interviewed, but instead to reenroll at Riverview. At their due process hearing, both sides presented testimony as to which school (one of the two private day schools or Riverview) would be appropriate for A.K.'s complex needs. Experts testified that both the recommended day schools were inappropriate for A.K., because their student populations included children with psychiatric and behavioral problems, which A.K. did not have, and which could cause serious problems for A.K. Both the hearing officer and the District Court denied the parents' claim, but the Fourth Circuit Court of Appeals reversed (484 F.3d at 681):

> Here, we hold as a matter of law that because it failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits.
>
> * * *
>
> Especially in this case, in which the parents had tried in vain to find a local private day school that could meet A.K.'s specialized needs, the offer of an unspecified "private day school" was essentially no offer at all (id at 682).
>
> * * *
>
> We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly (emphasis added).

The Fourth Circuit took pains to clarify its position that, because A.K.'s needs were so particularized, the School District was required to offer a specific school that could satisfy his needs, not merely a generic "Level II—Private Day School placement," and that its holding in the case before it did not necessarily bind all other cases involving similar challenges to IEPs under IDEA.

Petitioners herein do not mention the Fourth Circuit's decisive refusal to hold that "a school

district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided."

In addition to their failure to mention the full holding of A.K., petitioners also make crucial misstatements in regard to the facts of the case herein. Petitioners repeatedly, and inexplicably, refer to "New York City's relatively rogue practice and policy of **unilaterally** determining . . . school placement" (Pet. 12) (emphasis in the original); see similar language at Pet. 17, 19, 21. Petitioners also refer to DOE's school recommendation as "dictated" and "final" (Pet. 17, 19).

However, there was nothing either final, unilateral, or dictatorial about DOE's attempts to find the right school for T.Y. The record clearly demonstrated, and the Circuit Court correctly held:

> We note, however, that notwithstanding our holding here, the evidence reflects that T.Y.'s parents did participate in school selection and that the NYCDOE worked cooperatively with the parents after they voiced their objections. The NYCDOE offered the parents one school, which they rejected. The NYCDOE offered the parents another school, which they also rejected without an on-site visit. The parents then enrolled their child into the Rebecca School without allowing the NYCDOE an opportunity to offer yet another school. The parents' actions

> suggest that they seek a "veto" over school choice, rather than "input"--a power the IDEA clearly does not grant them.

After analyzing the legislative history of the IDEA, as well as its own precedent regarding the issue of how "location" should be defined, the Circuit Court correctly held (Pet. 13):

> Therefore, we conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason. We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA (citations omitted).

Thus, comparing the above underscored statement with that of the Fourth Circuit ("we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided"), it is clear that the conflict between these two Courts of Appeals is not a meaningful one, if, in fact, it is a conflict at all.

Additionally, petitioners cite Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484 (2009), for the proposition that New York City is not entitled to a

special exemption from the requirements of IDEA (Pet. 19). This reference is without merit, since Forest Grove holds that parents may seek reimbursement for private school tuition when the public school has failed to provide a free appropriate public education, and that they may do so without having first tried the public school system. Because the Forest Grove school district's cursory examination of T.A.'s problems omitted testing him for ADHD, later discovered to be at the root of his learning disabilities, the Court held that T.A. had been denied a FAPE.

In marked contrast, at every level of the litigation herein (the Impartial Hearing, the State Review Officer's Decision, the District Court's Order, and the Order of the Second Circuit Court of Appeals), it was repeatedly emphasized that T.Y.'s IEP was thorough and detailed, and that it offered him a FAPE specifically designed to meet his significant developmental delays. Thus, the Order of the Second Circuit Court of Appeals herein does not conflict with this Court's holding in Forest Grove.

B. Petitioner's Second Point was not Raised Below, and Thus is Unpreserved.

Petitioners also raise a new issue, that of whether or not courts may look outside the four corners of the IEP to determine whether it provides a FAPE (Pet. 17-18).

In Singleton v. Wulff, 428 U.S. 106 (1976), this Court held, "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Accord Exxon

Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); United States v. Penev, 2010 U.S. App. LEXIS 1512 (2d Cir. 2010).

In any case, the specifics of this issue were not raised at all by petitioners, and were not touched upon by the Circuit Court or the District Court herein.

Additionally, the two cases cited by petitioners as evidence of a split between the Circuits in addition to A.K., are so fact-specific that they have little bearing on the case herein. In Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008), the IEP for the autistic child was not even completed, and the Tenth Circuit remanded the matter for consideration of whether the draft IEP substantially denied the child a FAPE, and required the District Court to consider only the written IEP. Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994), involved a autistic child whose school district offered him a placement in a school with no teachers trained to teach autistic children, and where he would be the sole autistic student, thus denying the child a FAPE. Both these cases included oral discussions of schools that were not documented.

Like A.K., both these cases, of course, present completely different situations than the one herein, where the IEP was thoroughly reviewed by the Hearing Officer, the State Review, the District Court, and the Circuit Court, and was correctly found to offer T.Y. a FAPE.

C. The Second Circuit Correctly and Thoroughly Analyzed the Proper Meaning of "Location" in IDEA.

Petitioners argue that the Second Circuit failed to give the "ordinary" meaning to the term "location" in the statute (Pet. 22-26). However, as petitioners concede, the term "location" is not defined in the statute (Pet. 22). Petitioners themselves failed to address the legislative history of the terms "location" and "educational placement" in the statute, which the Second Circuit expressly laid out (Pet. A-11, 12). As the Court noted, both the United States Department of Education's 1999 commentary, and the United States Senate's 1977 commentary indicate that "the term 'location' does not mean the specific school location, but the general environment of the overall program" (Pet. A-13). Thus, petitioners' argument that the word must be given its "ordinary" meaning (by which they mean a specific, bricks-and-mortar school), is contradicted by the Court's clear and rational analysis explaining why petitioner's interpretation of the language is incorrect (Pet. A-11).

Furthermore, petitioners' claim that the Court "inexplicably ignored" the statutes cited by petitioners is incorrect, because the Court reviewed petitioners' statutory argument and then concluded (Pet. A-11):

> While the parents' citation of the statute and regulations is, at first glance, compelling, upon closer evaluation we conclude that this language does not compel the result the parents seek.

Additionally, petitioners here revisit their argument that the statute gives parents membership status at the IEP meeting and beyond, but that the IEP herein somehow excluded them when it came, finally, to school choice (Pet. 23-24). The Court addressed that issue, as noted above, when it pointed out that petitioners "*did* participate in school selection and that the DOE worked cooperatively with the parents after they voiced their objections," concluding that membership did not entitle the parents to "veto" power (Pet. A-13).

Thus, for all the reasons set forth above, viewing the totality of the circumstances herein, the decision of the Second Circuit, affirming the District Court's dismissal of this action under the IDEA, does not conflict with those of the Fourth or other Circuits in a meaningful way. The Court properly concluded that (1) the failure to name a specific school in the IEP did not contravene the IDEA, and (2) in any case, the petitioners were included in the process of school selection.

Therefore, as the decision herein is legally correct, and does not conflict with any decision of this Court, it does not otherwise warrant further review by this Court. See Rule 10, Supreme Court of the United States Rules.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
April 8, 2010

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 788-1064 or 1010

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW
SUZANNE K. COLT,
of Counsel.
*Counsel of Record